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No. 95-910

Supreme Court, U.S.
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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

DISTRICT OF COLUMBIA, *et al.*,
*Petitioners,*
v.
DARRYL COVINGTON, *et al.*,
and Consolidated cases,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1) Whether this Court should disturb the district courts' factual findings as to the reasonable hourly rates for attorneys' fee awards when those courts relied upon extensive record evidence, including a regularly updated matrix of prevailing market hourly rates that is used by the U.S. Attorney's office and that was based on an extensive survey of hourly rates charged by attorneys in the District of Columbia who litigate complex federal cases?

2) Whether, under federal fee-shifting statutes, successful plaintiffs represented by public interest attorneys may recover attorneys' fees based on the market rates for attorneys of similar skill, experience, and reputation, or are they limited to recovering the below market hourly rates that they may occasionally be paid by their clients of limited means?

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## RESPONDENTS' BRIEF IN OPPOSITION

The respondents request that this Court deny the Petition for Writ of Certiorari.

## STATEMENT OF THE CASE

### I. INTRODUCTION

The cases before this Court involve attorneys' fee awards under federal fee-shifting statutes in three separate civil rights cases against the District of Columbia ("the District"). Consistent with *Blum v. Stenson,* 465 U.S. 886 (1984), the court in each case awarded attorneys' fees based on market hourly rates for attorneys of similar skill, experience, and reputation. Pursuant to *Save Our Cumberland Mountains v. Hodel,* 857 F.2d 1516 (D.C. Cir. 1988) (*in banc*) (*"SOCM"*), each court awarded plaintiffs hourly rates prevailing in the District of Columbia for attorneys of similar skill, experience, and reputation and held the public interest attorneys representing plaintiffs were not limited to the below market hourly rates they charge their impecunious clients.

Each district court found persuasive the plaintiffs' evidence of market rates. Plaintiffs submitted fee awards in recent similar cases in the District of Columbia, newspaper surveys providing rates charged by local law firms, and affidavits of attorneys of similar experience regarding rates charged fee-paying clients for similar work. The courts found particularly persuasive as evidence two matrices of prevailing community rates: one used by the U.S. Attorney's office, and one developed by the private bar. Use of such a matrix was approved post-*Blum* by the D.C. Circuit. *SOCM*, 857 F.2d at 1525. In these cases, neither plaintiffs nor the courts applied this matrix rigidly or as an "irrebuttable presumption"; in fact, some of the rates sought and awarded were below the matrix rates.

The courts below found unpersuasive the single affidavit submitted by the District. Neither the district courts

nor the D.C. Circuit shifted the burden of proof for establishing hourly rates to the District, but rather, found that plaintiffs met their burden and that the District's limited evidence was insufficient to rebut plaintiffs' extensive evidence.

The hourly rates used in the lodestar added no enhancement for contingency that would contravene *City of Burlington v. Dague*, 505 U.S. 557 (1992). Contrary to the District's assertions, and as demonstrated by the fee requests in *SOCM* and *Laffey v. Northwest Airlines, Inc.*,[1] public interest attorneys charged reduced rates to their impecunious clients and asserted that fact in support of market rate awards, years before *Dague* barred contingency enhancements; this practice is not an attempt to circumvent *Dague*.

The D.C. Circuit affirmed in all three cases the district courts' exercise of discretion in setting reasonable hourly rates based on prevailing market rates. App. 3. The Court also denied the District's Petition for Rehearing and Suggestion for Rehearing In Banc, with only Judge Henderson, who had dissented from the panel decision, and Judge Williams voting in favor of rehearing *in banc*. App. 82-84.

These awards are entirely consistent with decisions of this Court. As in *Blum*, attorneys with a practice that concentrates on representing clients who cannot afford to pay market rates, and on cases in which the plaintiff is a "private attorney general," are compensated based on the market value of their time, rather than on the modest amounts paid by clients of limited means. Consistent with *Dague*, the fee awarded is the reasonable number of hours worked multiplied by a reasonable hourly rate, with no enhancement for contingency.

There is no conflict among the Circuits, either on these questions or on the meaning of *Blum* or *Dague*. While

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[1] 572 F. Supp. 354 (D.D.C.), *rev'd on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985).

there has been some variation in different Circuits' applications of *Blum*, this variation arises from the unique facts and evidence of each case, not a Circuit conflict.

## II. THE *LAFFEY* MATRIX

The *Laffey* matrix was adopted in an employment discrimination case, *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C.), *rev'd on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985) and was cited with approval by the D.C. Circuit in *SOCM*, 857 F.2d at 1525. The matrix was based on a survey of lawyers at more than 20 law firms in the Washington, D.C. area, ranging in size from solo practitioners to large firms, and representing rates of more than 1400 attorneys of various seniority levels, including 80 specifically-named lawyers.

The *Laffey* court selected "prevailing market rates" for the matrix that were in the middle of the range of rates in the survey.[2] While the court awarded matrix rates to attorneys it found were well qualified and highly capable—as are the attorneys here—the court did not conclude that matrix rates apply only to exceptional attorneys. *Laffey*, 572 F. Supp. at 374-77. The inclusion of rates for inexperienced junior attorneys in the matrix demonstrates that it was not designed to "reflect rates paid to attorneys of extraordinary experience and expertise" as the District claims. Petition at 5.

The *Laffey* matrix has been relied upon regularly to determine prevailing market rates.[3] The private bar peri-

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[2] *Laffey*, 572 F. Supp. at 374-75. For example, the 1983 rates for "very experienced court litigators (*e.g.*, 20 or more years of experience)" ranged from $150 to $250 per hour. The $175 *Laffey* matrix rate selected for "very experienced federal court litigators" was lower than most survey rates for that experience level. The same pattern holds true for other matrix rates, demonstrating the *Laffey* matrix did not reflect solely or even primarily "premium" rates charged by so-called "luminaries of the bar."

[3] *See, e.g., Park v. Howard University*, 881 F. Supp. 653 (D.D.C. 1995), *vacated on other grounds*, —— F.3d ——, 1995 WL 738946

odically updates the matrix and in the early 1990s, the U.S. Attorney's Office developed its own matrix, based upon *Laffey* market rate information, but updated annually using the Consumer Price Index.

*Laffey* matrix rates are prevailing market rates, not "premium" rates. A comparison with attorneys' fees awarded in Independent Counsel cases shows that some rates awarded in those cases were much higher than the matrix rates.[4] *The National Law Journal* article referred

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(D.C. Cir. Dec. 15, 1995); *Cook v. Billington*, No. 82-0400 (Sept. 22, 1995) (approval of class-action settlement agreement with rates based on U.S. Attorney's matrix), *appeal pending on other issues; Shepherd v. ABC*, 862 F. Supp. 505 (D.D.C. 1994), *vacated on other grounds*, 62 F.3d 1469 (D.C. Cir. 1995); *Brown v. Pro-Football, Inc.*, 846 F. Supp. 108, 116 (D.D.C. 1994), *reversed on other grounds*, 50 F.3d 1041 (D.C. Cir. 1995), *cert. granted*, —— U.S. ——, 1995 WL 555467, 64 U.S.L.W. 3410, 64 U.S.L.W. 3414 (Dec. 8, 1995); *Drummond v. Howard Univ.*, No. 91-CA-9446 (D.C. Super. Ct. Dec. 8, 1994); *Hartman v. Catto*, No. 77-2019 (Special Master's Report) (D.D.C. February 18, 1994 at 11); *Hodge v. Kemp*, No. 92-1183 (SS) (D.D.C. May 4, 1993) (approving settlement reflecting rates as set forth in 1992 U.S. Attorney's Office matrix); *Fischbach v. District of Columbia*, C.A. No. 87-0646, 1993 U.S. Dist. LEXIS 19756 (D.D.C. Jan. 4, 1993), *appeal dismissed*, 1994 U.S. App. LEXIS 19231 (D.C. Cir. 1994); *Robles v. United States*, C.A. No. 84-3685, 1992 U.S. Dist. LEXIS 142 (D.D.C. Jan. 10, 1992); *Estate of Willis Brown v. District of Columbia*, No. 6052-87 (D.C. Super. Ct. March 22, 1991) (awarding rates consistent with *Laffey* matrix); *Kidd v. District of Columbia*, No. 89-92695 (D.C. Super. Ct. Feb. 12, 1991) (adopting matrix rates); *Hatfield v. Garrett*, EEOC Decision (Sept. 26, 1990); *Trout v. Ball*, 705 F. Supp. 705, 709, n.10 (D.D.C. 1989); *Palmer v. Barry*, 704 F. Supp. 296, 298 (D.D.C. 1989); *Thompson v. Barrett*, 599 F. Supp. 806, 814 (D.D.C. 1984); *Palmer v. Schultz*, 594 F. Supp. 433 (D.D.C. 1984); *Thompson v. Sawyer*, 586 F. Supp. 635, 641 (D.D.C. 1984); *Planells v. Howard Univ.*, 34 F.E.P. Cas. 66, 69 (D.D.C. 1984).

[4] *See In re North (Regan Fee Application)*, —— F.3d ——, 1995 U.S. App. LEXIS 36364 (D.C. Cir. Dec. 22, 1995) (awarding, *inter alia*, rates of $400 and $385 to attorney with 26-28 years of experience, rate of $235 and $250 for attorney with 4-6 years, and $205 for attorney with 1-3 years); *In re North (Bush Fee Application)*,

to by the District, Petition at n.3, also shows a higher top rate ($400), and for an *earlier* year (1990). The 1992-93 matrix rates for partners ($225-$300) fall well within, and not at the top of the range of $205-$400 in the 1990 survey of *The National Law Journal*. J.A.(I) 117. Furthermore, use of the matrix by the U.S. Attorney's office "to determine whether hourly rates sought by attorneys in cases involving fee shifting statutes are reasonable," J.A.(II)87, suggests that matrix rates are typical, rather than "premium" rates.

The fact that the *Laffey* matrix is structured so that a single rate is assigned to a range of seniority levels (e.g., 11-19 years), rather than having a different rate for each year of experience does not invalidate the matrix or make it impermissible as evidence. Courts may depart from the matrix when an attorney's seniority, performance, or credentials suggest a higher or lower rate.

## III. THE DISTRICT COURT DECISIONS

### A. Their Common Threads

The fee awards here were not based solely on the matrices. Each district court considered the detailed declarations of plaintiffs' counsel attesting to the public interest nature of their law practices, and to their custom of taking cases involving significant issues of public interest and of charging no fee at all or only the limited amount clients could pay. Each court also examined extensive market rate information, including newspaper surveys of rates actually charged by various law firms, other awards of fees to similarly experienced lawyers handling federal litigation in the District of Columbia and one or more *Laffey* matrix. J.A.(I)14; J.A.(II)16 n.12; J.A.

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59 F.3d 184 (D.C. Cir. 1995) (awarding $375 per hour for most senior attorney); *In re North (Schultz Fee Application)*, 8 F.3d 847 (D.C. Cir. 1993) (calling $370 per hour for most senior attorney and $310 for another partner "well within the range charged by lawyers in the District of Columbia").

(III)16-17. Moreover, *Sexcius* and *Covington* were simultaneously decided by Judge Lamberth, who had the evidence in each case before him when he decided the other. J.A.(II)17.

In each case, the District submitted a single affidavit reciting isolated rates charged by a few solo or small-firm plaintiffs' lawyers. These included rates charged *six years prior* to the fee awards in these cases (Adler and Bennett 1987 rates), J.A.(I)218-19. The District's affidavit included rates for one firm substantially in excess of the District's proposed submarket, J.A.(I)222.

Based upon reviews of all these materials, observation of counsel's performance, and their extensive familiarity with rates charged by and awarded to local attorneys with similar experience and competence, each court found that these counsel charged below-market rates, and that counsel did so for non-economic, public service reasons. Consistent with *Blum* and *SOCM*, the courts awarded rates generally consistent with rates on the matrices.

Contrary to the District's assertions, the district courts did not apply the matrix slavishly and rigidly. No court indicated it was *required* to award matrix rates, and the courts actually awarded some lower-than-matrix rates. Each court found ample evidence to support the rates awarded, and found the District's limited rebuttal evidence insufficient to overcome the reasonableness of the rates established by plaintiffs' extensive evidence.

**B. *Covington*** [5]

Plaintiffs in *Covington* are ten inmates of a District of Columba prison who were beaten by correctional officers while handcuffed. They sued the District under 42 U.S.C. § 1983. The jury awarded damages of $774,505. The parties settled while the District's appeal was pending.

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[5] Respondents limit their presentation to lead counsel in each of these cases. Respondents note, however, that rates lower than the matrix rates were requested and awarded for additional attorneys. App. 6-8.

The settlement provided entitlement to a fee award, but the parties did not agree on hourly rates.

Plaintiffs' fee application included detailed information about counsels' skill, experience, and reputation,[6] their reduced rate billing practice, and prevailing market rates for similar services by comparable lawyers. Plaintiffs' lead counsel, Gaffney & Schember, P.C., is a two-attorney firm, with a practice that includes federal court litigation concerning civil rights and civil liberties, military law, and employment law, on behalf of persons of modest means or public interest organizations. J.A.(I)159-160. The firm handles cases on a fee award or contingent fee basis, on a reduced hourly rate basis, and on a *pro bono* basis. J.A.(I)160. Most fees come from fee award or contingent fee cases. *Id.*

Messrs. Schember and Gaffney quoted prospective clients a below-market hourly rate ($125 per hour from 1986 to mid-1990 and $150 per hour from mid-1990 to the present), J.A.(I)164 & 170-171, but often charged less or nothing at all, depending on the client's ability to pay and the significance of the issues. J.A.(I)164 & 170-171. Rather than showing, as the District suggests, that "they have responded to market conditions by charging rates below those charged by large firms and by maintaining fairly constant rates over the years," Petition at 9-10, these declarations show they set rates without regard to market rates, opting instead to charge rates that would permit low income clients to bring cases of public significance. The rates charged were not "the rates they can command in the market."

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[6] Schember and Gaffney worked at the Lawyers' Committee for Civil Rights Under Law after graduating from law school in 1974 and 1975, respectively, and went into private practice in late 1977. J.A. (I) 150 & 159. Mr. Schember was an Adjunct Professor of Law at Antioch School of Law. Counsel submitted detailed declarations highlighting their firm's and their own significant achievements, awards, and their cases and victories involving civil rights and liberties. J.A. (I) 150-176; J.A. (I) 150-154, 160-162.

Plaintiffs' extensive evidence of rates charged by similar counsel in comparable cases included:

- The original *Laffey* fee matrix (1983) with an affidavit (Oct. 26, 1984), by Daniel A. Reznek, fee counsel in *Laffey*. J.A.(I)39-53.
- A second Reznek affidavit (July 29, 1987) in a civil liberties case, *Hobson v. Brennan*, Civil Action No. 76-1326 (LFO) (attesting to increases in market rates since original *Laffey* matrix.) J.A. (I)54-62.
- A third Reznek affidavit (Aug. 4, 1988) used in *In Re: Donovan* (attesting to further increases in market rates.) J.A.(I)73-77.
- The post-*SOCM Laffey* matrix from a declaration by Joseph A. Yablonski (March 2, 1989), *SOCM* counsel (used in *Broderick* v. *Ruder*, Civil Action No. 86-1834, an employment discrimination case, indicating fees in *SOCM* were "finally settled, at rates extremely close to those reflected on the matrix, with Government agreeing [to] rates of $245 to $255 per hour.") J.A.(I)84-89.
- The decision in *Hatfield v. Garrett*, No. 01892909 (EEOC, Dec. 12, 1989) (discrimination case awarding market rates under *SOCM* using updated *Laffey* matrix. J.A.(I)90-105.
- A declaration from Joseph M. Sellers (Feb. 21, 1990), an experienced civil rights litigator with the Washington Lawyers Committee for Civil Rights Under Law attesting that updated *Laffey* matrix "fairly reflects the prevailing rates in the District of Columbia for lawyers engaged in complex federal litigation such as the trial of civil rights claims." J.A.(I)106-111.
- The U.S. Attorney's version of the updated *Laffey* matrix filed by the government in *Lewis v. Brady*, Civil Action No. 92-0898 (TFH), a discrimination case. J.A.(I)112.

- A Memorandum Opinion in *Robles v. United States*, Civil Action No. 84-3685 (TAF) (Jan. 10, 1992), an employment discrimination case awarding under *SOCM* using the *Laffey* matrix. $250 per hour for 1991-92. J.A.(I)119-140.
- A fourth Reznek affidavit (Feb. 24, 1992) used in a civil rights case, *Parker v. District of Columbia*, Civil Action No. 83-3382 (JHG) (attesting to rate increases and indicating 1992 rates for senior lawyers in *Parker*, $250 and $265, "are consistent with or lower than the prevailing hourly rates charged by other lawyers of comparable skill and experience in the District of Columbia." J.A.(I) 78-83.
- The U.S. Attorney's Office matrix from the Stipulation of Settlement in *Hodge v. Kemp*, Civil Action No. 92-1183 (SS), an employment discrimination case. J.A.(I)298-301.
- A Memorandum Opinion (Jan. 4, 1993) in *Fischbach v. District of Columbia*, Civil Action No. 87-0646 (JGP), an employment discrimination case, awarding fees under *SOCM* using *Laffey* matrix. ($240 and $265 per hour). J.A.(I)254-262.
- Hourly rate information for lawyers at twelve local law firms for 1989, 1990, and 1991 (*Legal Times*, Dec. 9, 1991). J.A.(I)184.

The District's response was a declaration from its own attorney, Michael E. Zielinski, J.A.(I)217-227. The declaration acknowledged that "[s]ome large firms have . . . been involved in civil rights cases against the District" and that such large firms "do request fees . . . at their normal billing rates that are typical of the premium rates listed in the Laffey matrix." J.A.(I)224-225. The declaration was silent about the rates the District has paid large firms that prevail against it in civil rights cases, but showed no similar restraint in discussing fees paid nine solo practitioners or small firms who sued the District in civil rights cases and charged only about $150 per hour.

J.A.(I)220-225. Based on these few examples, the District asserted the relevant market was a sub-market of plaintiff's attorneys who handle civil rights cases and employment discrimination cases rather than the market for complex federal litigation, and that the rate for this sub-market was only $150 per hour for attorneys with between 10-20 years of experience rather than the higher prevailing market rates for complex federal litigation.

Notwithstanding the District's assertion that none of these cases was complex, the court found that "[p]laintiffs' counsel handled very well this *complicated federal case* which involved the constitutional claims of ten plaintiffs against sixteen defendants, lengthy discovery, many motions and a jury trial." J.A.(I)7 (emphasis added).

The court found that "defendants have not challenged plaintiffs' declarations showing that Gaffney & Schember, P.C. has a history of handling civil rights and civil liberties cases either without charge or at 'below-market rates' for non-economic reasons" and that "defendants have failed to disprove" that plaintiffs' counsel "charge some of their poorer clients reduced rates out of public interest motives." J.A.(I)10.[7] He found as a fact that plaintiffs' counsel were "public interest but private practice lawyers" and, citing *SOCM*, held they were "entitled to receive prevailing market rates for their services." *Id.*

The court found plaintiffs "have presented sufficiently persuasive evidence charting the prevailing market rates of litigators of complex federal matters," J.A.(I)13-14. It held "plaintiffs have met their evidentiary burden," and awarded Schember and Gaffney, each with over 18 years of experience, $260 per hour. J.A.(I)18.

Judge Lamberth held that the District had not established a valid sub-market consisting only of plaintiffs' lawyers in civil rights and employment cases, or that the prevailing rates for the proposed sub-market were lower

[7] The District conceded that lead counsel "discount[ed] or reduc[ed]" their rates "with some regularity." Defendants' Opposition to Plaintiffs' Motion for Fees at 8 (January 29, 1993).

than the rates prevailing in the broader market for complex federal litigation. J.A.(I)13. Regarding the District's evidence, Judge Lamberth said:

> These seven examples look suspiciously representative of only the lower end of the sub-market. Just because some lawyers are willing to take some civil rights, employment, or discrimination cases at low-end rates of $125 to $150 per hour does not establish $125 to $150 per hour as the prevailing market rate for the entire sub-market.

J.A.(I)15-16. Judge Lamberth observed that "[d]efendants have failed to proffer evidence of the high end, as well as the low end, of the range of rates commanded by very experienced counsel in their proposed sub-market." J.A.(I)16. Overall, the court found that "defendants' factual rebuttal of plaintiffs' evidence [on rates] has been ineffectual." J.A.(I)18.

***C. Sexcius***

Plaintiffs Sheriel Sexcius and William Edmead, two school teachers, signed a petition opposing certain educational practices. The District took action to remove them from their teaching jobs, and they sued under 42 U.S.C. § 1983. The Court granted judgment in their favor and a permanent injunction forbidding defendants from infringing on plaintiffs' constitutional rights. The District appealed, but withdrew the appeal.

Plaintiffs' fee application cited three recent local attorneys' fee decisions approving hourly market rates based upon the U.S. Attorney's Office *Laffey* matrix. J.A.(II) 35. Plaintiffs also submitted the original *Laffey* matrix and an explanatory Affidavit (J.A.(I)84), a U.S. Attorney's Office *Laffey* matrix (J.A.(II)40-41), the fee decision in *Fischbach v. District of Columbia* (J.A.(I)254), and declarations by plaintiffs' counsel describing their public interest practice skills, experience, and accomplishments. J.A.(II)41-56.[8]

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[8] Before becoming an Administrative Law Judge in 1991, Edith Barnett practiced labor and employment law for approximately 21

The District opposed the hourly rates sought by raising the same issues raised in *Covington*, and by again filing Mr. Zielinski's *Covington* affidavit. J.A.(II)57-67. The District contended that Judge Barnett and Ms. Weiss were limited to a rate of $100 per hour, the reduced rate their school-teacher clients paid.[9]

Judge Lamberth made specific factual findings that Weiss and Barnett met the *SOCM* criteria for public interest practice, and awarded fees based on the prevailing market rate. J.A.(II)10-11. J.A.II(18-19).[10] He determined that $260 per hour for Ms. Weiss (18 years of experience) and Ms. Barnett (21 years of experience) were "reasonable" market rates.[11]

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years. J.A. (II) 48-56. Judge Barnett served as a litigator and supervisory attorney with the Solicitor's Office of the U.S. Department of Labor from 1971 through 1981. In 1981 she became Associate General Counsel to the American Federation of State, County & Municipal Employees and, thereafter, went into private practice. Lead counsel Weiss had practiced labor and employment law for approximately 18 years. Weiss is a veteran of the Solicitor's Office, U.S. Department of Labor, the General Counsel's Office of the EEOC, and has extensive experience in private practice as a labor and employment specialist. Both attorneys in *Sexcius*, like the attorneys in *Laffey*, litigated landmark employment cases. J.A. (II) 41-56. Both are recognized experts in labor law and employment discrimination law, have lectured, published and held leadership positions in bar associations in these specialties, and have served as federal court mediators in employment and labor cases.

[9] In response, plaintiff submitted an EEOC attorneys' fee decision (J.A. (I) (90), the Affidavit of David R. Cashdan from *Galloway* (J.A. (II) 83-84), and a Declaration by Assistant U.S. Attorney James R. Layton stating that the D.C. U.S. Attorney's Office "regularly use[s] the attached matrix to determine whether hourly rates sought by attorneys in cases involving fee-shifting statutes are reasonable." J.A. (II) 87.

[10] The district court's holding was proper under this Court's decision in *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989) (fee agreement does not impose ceiling on fee award).

[11] These were the rates requested by plaintiffs. If the litigants had automatically sought *Laffey* rates, the rate for Ms. Barnett would have been higher—$285.

**D. *Galloway***

This case of first impression under the Americans with Disabilities Act was brought by Donald Galloway, who was excluded from jury service because of his blindness. The district court awarded injunctive relief and damages. The District did not appeal.

Mr. Galloway's fee motion relied principally on three attorneys' fee decisions relying on the *Laffey* matrix. J.A.(III)25. Mr. Galloway also offered the Sellers Affidavit in support of the Matrix.[12] Lead counsel Vicki Golden's affidavit set out her extensive experience in complex federal litigation, including ten years at the Department of Justice and two years in a large firm. J.A.(III) 28-32. Mr. Galloway also submitted the Layton Affidavit with the U.S. Attorney's Office matrix, and a second Affidavit identifying the established billing rate Ms. Golden's former law firm now charges for lawyers with her experience, and suggesting use of this rate. J.A.(III) 41-52. In opposing the rates requested, the District submitted the same affidavit and proposed the same "mini-market" as in *Covington*. J.A.(III) 16 n.5.

Judge Green relied on *SOCM* and awarded Ms. Golden and other attorneys market rates. She noted that Ms. Golden left a more lucrative practice to represent less wealthy clients, and that she does not have an established billing rate. J.A.(III)14. The court found that "Ms. Golden is exactly the type of private attorney who charges reduced rates to clients due to non-economic goals discussed in *SOCM*." *Id.* It found that the *Laffey* matrix "is the most credible evidence of rates for this market." J.A.(III)15 & n.1. Judge Green found the

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[12] Sellers described the matrix's history and attested that, based on Mr. Sellers' experience in litigating over fifty claims of discrimination in the Washington area, matrix rates "fairly reflect the prevailing rates in the District of Columbia for lawyers engaged in complex federal litgation, such as litigation of civil rights claims." J.A.(III)37-40.

reasonable market rate for Ms. Golden, (18 years of experience), to be $250 in 1992 and $260 in 1993.

## IV. THE COURT OF APPEALS' DECISION

The Court of Appeals affirmed all findings of fact concerning reasonable hourly rates and correctly held that each case "involves a relatively straightforward application" of principles established in *Blum* and *SOCM*. App. 11. The Court of Appeals held that each district court made specific factual findings either that plaintiffs' counsel had no established billing rates or that, although they charged some clients on an hourly basis, the rates charged were reduced for public spirited, non-economic reasons. The Court determined these findings were supported by the evidence, and there was ample evidentiary support for each court's findings as to the prevailing "market rate." App. 17-21. The Court noted that the *Laffey* matrix is a "useful starting point," and listed other evidence that can supplement the matrix. App. 16.

Nothing in these decisions either requires that *Laffey* rates be awarded in *all* cases where the practitioner charged less than the *Laffey* matrix, or makes evidence of actual rates irrelevant. Likewise, the decision did not place the burden of proof on defendant and does not make the *Laffey* rates an irrebuttable presumption. Rather, matrix rates only apply to counsel who prove they meet the three *SOCM* requirements *and* prove that his or her skills, reputation, and experience are similar to those of other practitioners of similar quality and experience who command such rates in similar matters. Based on the evidence before them and their own experience, district courts can award *Laffey* rates or depart from them, either to reflect counsel's normal market-based billing rate or to reflect counsel's higher or lower competence.

## REASONS FOR DENYING THE WRIT

Stripped of all its cert-seeking rhetoric, the District's petition merely attempts to reverse a decision affirming the exercise of district court discretion in three cases

involving factual determinations about appropriate attorney hourly rates. In enacting these fee-shifting statutes, Congress recognized the rights at stake are vitally important and that without fee-shifting, citizens whose rights were violated typically could not afford to hire attorneys. Following *Blum*, the D.C. Circuit permits certain prevailing plaintiffs to recover rates their public interest attorneys could command in the market, rather than below market rates charged clients of modest means. The Court of Appeals properly placed the burden on plaintiffs to prove the rates charged to clients who can pay some fee are below market rates for attorneys of similar skills, experience, and reputation who handle comparable matters. The judge in each case found plaintiffs met this burden, and the Court of Appeals found sufficient evidence to support these findings. The lower courts' reliance, in part, on the matrix does not create a rule "legislative in nature" mandating the automatic application of matrix rates in every fee-shifting case.

Review by this Court is not necessary because the decisions below are entirely consistent with *Blum* and *Dague*. Each decision calculates a lodestar using prevailing market rates, which *Blum* holds are necessary to attract competent counsel and do not produce a windfall, and which *Dague* holds results in a fully compensable fee. None of the cases awards a contingency enhancement in addition to the lodestar. There is no conflict between the circuits regarding whether privately practicing but public interest counsel can be awarded a market rate higher than reduced rates charged clients. To the extent that decisions on hourly rates in the various circuits appear to take different approaches, such appearance arises from factual differences in the cases, rather than disagreement on the interpretation of *Blum* or *Dague*.

## I. THE DECISION OF THE COURT OF APPEALS IS ENTIRELY CONSISTENT WITH THE DECISIONS OF THIS COURT

### A. This Court's Decision in *Blum v. Stenson*

The District asserts that the Court of Appeals' decision conflicts with *Blum* because: (1) fees were awarded based on prevailing market rates rather than counsel's below-market rates; (2) the market rates used were for complex federal litigation rather than a mini-market of plaintiffs' civil rights attorneys from solo or small firm practices; (3) the *Laffey* matrices were used to create an irrebuttable presumption and cannot be used to help determine prevailing market rates; and (4) the Circuit opinion affirmed decisions that erroneously placed the burden of proof on defendants. No such conflicts with *Blum* exist, as we demonstrate below.

In *Blum* this Court considered the argument that "the use of prevailing market rates to calculate attorney's fees under § 1988 leads to exorbitant fee awards and provides windfalls to civil rights counsel contrary to the express intent of Congress." *Blum*, 465 U.S. at 892. The defendant wanted fee awards under § 1988 to be based on the cost of providing legal services rather than prevailing market rates. *Id.* This Court rejected both defendant's proposed cost-based approach and the Solicitor General's amicus argument (that the rate for nonprofit legal aid attorneys should be calculated differently from the rate for attorneys in for-profit private practice) in favor of the prevailing market approach. *Id.* at 892-95. The Court was guided by the legislative history of § 1988.[13] It concluded that "reasonable fees under § 1988 are to

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[13] *See* S. Rep. No. 94-1011, p. 6 (1976), U.S. Code Cong. & Admin. News 1976, pp. 5908, 5913 (citing, *inter alia*, *Davis v. County of Los Angeles*, 8 EPD ¶ 9444 (C.D. Cal. 1974) (awarding prevailing market rate and holding that "[i]n determining the amount of fees to be awarded, it is not legally relevant that plaintiffs' counsel . . . are employed by . . . a privately funded nonprofit public interest law firm").

be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel," *Blum*, 465 U.S. at 895, and that the evidence of prevailing market rates should show: "that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Id.* at 895, n.11.

Awarding the *market* rate, by definition compensates counsel appropriately without a windfall.[14] Awarding market rates also avoids unfairness that occurs by awarding the lawyer with superior skills, experience and reputation in a small-firm public interest practice, a lower rate than a less qualified or experienced lawyer, perhaps at a larger firm, who typically represents clients that can pay market rates.[15] The District challenges the district court findings and argues the Circuit decision always requires an award of *Laffey* rates. This concern is not borne out by experience since the 1988 *SOCM* decision. District courts have demonstrated the ability to determine when plaintiffs have met their burden to show reduced rates for non-economic reasons, and have not hesitated to deny higher rates when that burden was not met.[16]

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[14] *Missouri v. Jenkins*, 491 U.S. 274, 287 (1989) ("[i]f the fees are consistent with market rate and practices, the "windfall" argument has no more force with regard to paralegals than it does for associates"); *Blanchard*, 489 U.S. at 93-96 (rejecting argument there would be a "windfall" if fee recovery exceeded amount in contingent fee agreement, permitting plaintiff to recover lodestar fees based on "reasonable worth of services rendered," and stating that "[s]hould a fee agreement provide less than a reasonable fee calculated in this manner, the defendant should nevertheless be required to pay the higher amount"); *Blum*, 465 U.S. at 895.

[15] *See Bankston v. Illinois*, 60 F.3d 1249, 1256 (7th Cir. 1995) (holding: "[t]he district court may not reduce the established rate by some factor that it believes accounts for differences between large firms and small firms. Lawyers of common expertise and experience in the same market are entitled to the same rate").

[16] *See Goos*, 997 F.2d 1565, 1568-69 (1993) (affirming that plaintiff could recover only rate counsel normally charged ($130-$140),

The concept of basing "prevailing market rates" on rates charged in a narrow submarket [17] of a few plaintiffs' attorneys in a specific substantive area is contrary to Congressional intent in enacting the fee-shifting statutes, contrary to law, unworkable in civil rights and civil liberties cases, and was found by the district courts to be factually unsupported. To attract competent counsel, Congress intended prevailing plaintiffs under § 1988 to be compensated at the same rates as attorneys in other complex federal litigation. S. Rep. No. 1011, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913, stating:

> It is intended that the amount of fees awarded under [§ 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and may not be reduced because the rights involved may be non-pecuniary. . . .

*Accord*, H. Rep. No. 1558, 94th Cong., 2d Sess. 8-9 (1976). This Court's precedent does not require that attorneys' fees for civil rights and civil liberties cases be based on a "mini-market." [18]

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not rate "found in the schedule (or matrix) of prevailing community rates adopted in this circuit" (220-240), when "there [was] nothing in the record . . . to suggest that Ms. Goos' attorney offered her a discounted rate for altruistic reasons").

[17] This Court's normal policy is that issues not pressed and ruled on by the Court of Appeals are not properly presented for review. *Duignan v. United States*, 274 U.S. 195, 200 (1927). The District failed to press its sub-market argument in the Court of Appeals. App. 20. Consequently, the Court of Appeals did not fully discuss this issue. The District should not be permitted to resurrect it here. *California v. Taylor*, 353 U.S. 553, 556 n.2 (1957) (Court would not address question Court of Appeals held party waived).

[18] *See Blanchard*, 489 U.S. at 95 ("it is clear that Congress intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation"); *Blum*, 465 U.S. at 893 (looking to fee awards in antitrust case and case involving constitutional challenge to state statute to determine market rates in Medicaid case).

The applicable statutes entitle prevailing plaintiffs to a "reasonable attorneys' fee," which is a rate within the range of rates charged in the market for "similar work." *Jenkins*, 491 U.S. at 283; *Blum*, 465 U.S. at 895. Any "market rate" requires a purchaser willing and able to pay for the service. Indigents, or even individuals of moderate means, are typically unable to pay the actual lodestar attorneys' fees involved in a typical civil rights lawsuit, but can pay, if anything, only reduced rates or a lump sum. Under those circumstances, there are no "mini-market rates," and this Court has recognized that, in the absence of fee-shifting statutes, a "market" for the work of civil rights plaintiffs' lawyers "scarcely exists." [19]

The District failed to prove a sub-market exists, or to rebut plaintiffs' evidence of market rates for complex federal litigation. The evidence for the District's proposed mini-market was limited to solo or small firm lawyers representing plaintiffs against the District of Columbia, who have rates significantly below prevailing market rates.[20] J.A.(I)218-231. The district courts considered the District's limited evidence and found it unpersuasive.

The District asserts that prevailing market rates cannot be determined with a fee matrix. Contrary to this assertion, the 1993 Advisory Committee Notes to Rule 54(d) (Costs; Attorneys' Fees) of the Federal Rules of Civil Procedure expressly permit courts to "consider

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[19] *Dague*, 505 U.S. 564. *See City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986) (explaining that "Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process . . . These victims ordinarily cannot afford to purchase legal services at the rates set by the private market").

[20] Even though the District acknowledged it had paid matrix rates in civil rights cases, it omitted those firms or rates in its proposed sub-market. The record indicates the District paid a rate of $340 to a Covington & Burling attorney whose client prevailed in a civil rights case against the District. J.A.(II)85.

establishing a schedule reflecting customary fees or factors affecting fees within the community." Moreover, although the District takes the position here that use of the matrix is not permitted, the District has itself used the *Laffey* matrix as evidence of market rates.[21]

*Blum*'s recommendations regarding how to determine a "reasonable rate," do not preclude use of the *Laffey* matrix. Here, the matrices were used properly—as evidence of the prevailing market rate—not as an irrebuttable presumption; no court below suggested the matrix was mandatory. Criticisms of the structure or validity of the matrix go to the weight of the matrix, not to its use as evidence. In these cases, however, the affidavits describing updates of the matrix, and numerous specific rates in the record demonstrate the matrix "provide[s] credible evidence" of prevailing market rates, not premium rates that apply only to attorneys of "exceptional skill and experience" as the District contends.[22]

The District's contention that lawyers use the *Laffey* matrix as a floor, and always seek matrix rates is not borne out by the experience here; in both *Sexcius* and *Covington*, plaintiffs requested rates below the *Laffey* matrix for certain timekeepers. Moreover, district courts have demonstrated that they will not award matrix rates to attorneys they believe could not command such rates in the market.[23]

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[21] *See District of Columbia ex rel. Payton v. Basiliko, et al.*, No. 91-2518 (D.D.C.) (Memorandum of Points and Authorities in Support of Motion for Award of Attorneys' Fees at ¶ 9, (District submitted U.S. Attorney office matrix to support its fee request).

[22] J.A.(III)15. Plaintiffs submitted affidavits from Daniel Reznek, the attorney who formulated the original *Laffey* matrix, and from Joseph Yablonski, the lead attorney in *SOCM*, stating the original *Laffey* matrix and subsequent updates are conservative and reflect lower rates than those prevailing in the community. J.A.(I)55; J.A.(I)84-88. The original *Laffey* matrix rates were lower than many rates in the *Laffey* survey.

[23] As the District itself points out, Petition at 6, the *Laffey* court did not award matrix rates to an attorney who lacked sufficient experience. *Laffey*, 572 F. Supp. at 375, n.37.

In all of these cases, plaintiffs submitted detailed affidavits that provided ample information for the courts to find that counsels' practices were based on representing "worthy but not wealthy clients," and that the rates charged clients who could pay something were reduced because of the clients' limited ability to pay, rather than the skill, experience, and reputation of counsel. The record amply demonstrates that lead counsel in each case were highly skilled, very experienced and accomplished, and had won significant victories in these cases. J.A.(I)6-9, 150-176; J.A.(II)33 & 47, 56; J.A.(III)28-32. The courts assessed various counsels' experience, performance, and accomplishments as well as the evidence submitted by both sides and concluded "plaintiffs have shown that their counsel charge below-market rates out of public-spirited motives." J.A.(II)11. Therefore plaintiffs "were entitled to recover the prevailing market rate for their counsels' services." *Id.*; J.A.(III)14; J.A.(I)11. This finding was well supported by the record in each case.

Judge Lamberth and Judge Green applied their own considerable knowledge of attorney rates based on experience as judges and, previously, as practicing lawyers.[24] Each court awarded rates that the evidence indicated were well within the range of market rates for D.C. attorneys with similar skills, experience, and reputation doing comparable work on similarly complex federal cases.

### B. This Court's Decision in *City of Burlington v. Dague*

The District suggests the fees awarded are inconsistent with *City of Burlington v. Dague*, 505 U.S. 557 (1992). because they contain a hidden contingency enhancement.

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[24] Judge Lamberth headed the civil division of the U.S. Attorney's office in D.C. for more than a decade. In that capacity, he reviewed, litigated, and settled dozens of fee petitions, and as such was very familiar with hourly market rates. As a judge, Lamberth has considered fee petitions in at least 8 reported cases. Judge Green was in private practice for 17 years before becoming a judge in 1968, and has at least 3 reported attorneys' fee decisions.

The District also argues that across-the-board enhancements may not be used in setting a reasonable fee and that *Dague* therefore bars fee awards based upon the five experience groupings in the *Laffey* matrices. Petition at 22. Contrary to these strained arguments, no decision below awarded a "hidden contingency enhancement," granted "across-the-board enhancements," or selected rates *solely* based on an "experience group." The district courts awarded only market rates equal to the hourly value of counsels' services based on their assessment of each counsel's skill, experience, and reputation.

This Court held in *Dague* that the risk of non-recovery is not a basis for an upward enhancement of the lodestar. *Dague,* 505 U.S. at 562-67. The "market-based" hourly rates counsel received here did not "enhance" the lodestar, but were used to derive the lodestar, which is the "hours reasonably expended on the litigation times a reasonable hourly rate." *Blum,* 465 U.S. at 888. Awarding market rates in the lodestar ensures that it accurately reflects the experience, ability, and reputation of counsel.

Awarding market rates higher than the reduced rates clients can afford to pay is not an impermissible enhancement, but is fully consistent with *Dague. Dague* rejected a contingency enhancement *in addition to the lodestar fee.* Using market rates in the lodestar is entirely consistent with *Dague*, and is not a "contingency enhancement." [25] *Dague*, 505 U.S. at 562-63.

Similarly, using the *Laffey* matrix as evidence of the market rate does not create a class-based enhancement. Each court retains the authority and responsibility to assess counsel's skill, experience, and reputation, and the rate the attorney could command in the market. A court may determine that counsel can command rates consistent with the matrix, or that counsel should be awarded a higher or a lower rate. Likewise, the court may consider

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[25] Moreover, as noted *supra*, *SOCM*'s reduced rate theory *preceded* the bar on contingency enhancements and was not constructed to circumvent *Dague*.

other evidence of the market rate, and may choose to rely on this evidence instead of or in addition to the matrix. Because the matrix is neither mandatory nor presumptive, use of the matrix as evidence does not establish class-wide rates for all attorneys of each experience level.

The District also cites *Barrow v. Falck*, 977 F.2d 1100 (7th Cir. 1992), to support its "disguised multiplier" argument. *Barrow* has no relevance here. In *Barrow*, plaintiff's counsel had a market rate he normally charged his commercial clients. Id. at 1105. He neither contended nor submitted evidence that he reduced his rate to support the case of a worthy client who could not afford higher rates. *Barrow*, 977 F.2d at 1106. The plaintiff in *Barrow* sought to recover a rate in excess of his counsel's market rate. Here plaintiffs seek only market rates for their counsel. That is exactly what the district courts awarded, no more, no less.

## II. THERE IS NO INTER-CIRCUIT OR INTRA-CIRCUIT CONFLICT

The District attempts to create a conflict in the circuits, where none in fact exists. Although the various circuits have issued dozens of decisions involving hourly rates under fee-shifting statutes, the differences occasionally reflected are a function of the facts of the particular case and the evidence concerning reasonable rates. All those decisions used the same method to determine lodestar fees, i.e., a reasonable rate times a reasonable number of hours. To determine the reasonable hourly rate, courts have considered the skill, experience, and reputation of the attorney involved compared to what attorneys of similar skill, experience, and reputation are paid in the prevailing market for handling similarly complex federal litigation.

Regarding the issue presented here—whether attorneys in public interest private practice are restricted to reduced rates they occasionally charge some clients or whether they can be awarded prevailing market rates—all circuits that have ruled on the issue have done so in

a manner consistent with *SOCM*.[26] Regarding whether there are broader issues of alleged circuit conflict about how to calculate a reasonable rate, the District cites *Student Public Interest Research Group v. AT&T Bell Laboratories*, 842 F.2d 1436 (3d Cir. 1988) (*"SPIRG"*) as "identifying four distinct interpretations" of *Blum* footnote 11, "in the context of awarding fees, under federal fee-shifting statutes, to attorneys with for-profit practices." Petition at 23. The cases cited by the District do not support a current conflict among the circuits.

*SPIRG* identified four approaches: (1) a billing rate rule (mandating the rate an attorney bills clients); (2) a micro-market rule (emphasizing that rate awarded depends on market rates of comparable attorneys in similar cases); (3) a modified billing rate rule (applying attorney's billing rate plus a contingency enhancement); and (4) a community market rate rule (awarding rates charged by comparable counsel, without regard to attorney's billing rate). *Id.* at 1443-48. Even if these categories ever existed, *Dague* eliminated the modified billing rate (contingency enhancement) rule. *Dague*, 505 U.S. at 567.

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[26] *See Davis v. City and County of San Francisco*, 976 F.2d 1536, 1548 (9th Cir. 1992) (awarding prevailing market rates exceeding rates charged by plaintiffs' attorneys in private but public interest practices); *SOCM*, 857 F.2d at 1525 (D.C. Cir. 1988) (*en banc*) (permitting recovery of prevailing market rates for privately practicing attorneys who charged clients reduced rates for public interest reasons); *Student Public Interest Research Group v. AT&T Bell Laboratories*, 842 F.2d 1436, 1442-50 (3d Cir. 1988) (*"SPIRG"*) (awarding for-profit, public interest law firm prevailing community rate higher than rate counsel customarily charged); *Maldonado v. Lehman*, 811 F.2d 1341, 1342 (9th Cir. 1987) (upholding award of prevailing market rate in excess of counsel's actual rate), *cert. denied*, 484 U.S. 990 (1987); *Hall v. Ochs*, 817 F.2d 920, 928-29 (1st Cir. 1987) (award of prevailing market rate to attorney engaged in private public interest-oriented practice); *White v. City of Richmond*, 713 F.2d 458 (9th Cir. 1983) (award of market rates without regard to public interest attorneys' billing rates not abuse of discretion).

Similarly, no authority currently supports a strict "billing rate rule" (i.e., limiting counsel to actual rate paid by client regardless of any other circumstances). In support of the billing rate rule, *SPIRG* identified the panel decision in *SOCM*, which was overruled seven years ago. The rule adopted *en banc* in *SOCM*, is the same rule affirmed in this case. *SPIRG* also identified *Shakopee Mdewakanton Sioux Community v. Prior Lake*, 771 F.2d 1153 (8th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986) as following a billing rate rule, even though *Shakopee* does not adopt a strict billing rate rule. Although *Shakopee* awarded the attorney's current billing rate, it did *not* hold the attorney's actual billing rate should always apply. *Shakopee* expressly contemplated use of prevailing market rates rather than billing rates for certain situations.[27] Consistent with *Blum*, this approach permits consideration of both the attorney's own billing rate and the prevailing community rate, but values the relevance of these two measures differently depending upon the facts of the case. Normally, an attorney's own billing rate is presumptive, but not dispositive, evidence of the rate he or she can command in the relevant market. This presumption can be rebutted, however, if either party demonstrates the prevailing market rate for comparable services differs from the attorney's normal billing rate.[28] Thus, to the extent that counsel has market-based rates, those rates are relevant to the determination of a reasonable rate. To the extent

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[27] *See Shakopee*, 771 F.2d at 1161 (explaining that "[i]n many cases, the attorney's own billing rate will not provide the reliable measure such rates provide in this case where the attorney has hourly rates consistent with those charged in the community and specializes in the area of law which is the subject matter of much of the lawsuit. Absent these characteristics, the court must rely more heavily on prevailing community rates for similar services than on the attorney's own billing rate").

[28] *See Islamic Center of Mississippi v. Starkville*, 876 F.2d 465 (5th Cir. 1989) (describing this approach for calculating reasonable rate).

that counsel, like the public interest counsel in *Blum*, have no market-based rates, counsel's rate is set with reference to prevailing market rates.

All the cases categorized by *SPIRG* as micro-market or community market cases follow this approach. Both the so-called micro-market method and the so-called community market method ensure, as suggested in *Blum*, that the rate awarded is in line with the rates prevailing in the community for attorneys of comparable skill, experience, and reputation, doing similar work. In each case, the court relies on the evidence presented to determine the reasonable hourly rate. What *SPIRG* categorized as the micro-market and community market methods of determining a reasonable rate, really are the same approach applied to cases that defined the relevant market differently. No conflict among the circuits is presented simply because district courts make case-by-case determinations about the makeup of the relevant market.

As in *Shakopee*, the cases *SPIRG* describes as applying the micro-market method, apply the attorney's actual rate, insofar as it is consistent with prevailing (micro) market rates. To the extent that the attorney's actual rate differs from the rate prevailing in the micro-market, the courts consider both the billing rate and the prevailing market rate in that narrow market to determine what rate is reasonable.[29]

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[29] *See Lightfoot v. Walker*, 826 F.2d 516, 523-24 (7th Cir. 1987) (although actual rates were "a starting point," plaintiffs not limited to $70 per hour attorney received in practice in another specialty and geographic region, but could be awarded market rate of $85, based on evidence of rate counsel could command litigating this type of case in geographic region); *Mayson v. Pierce*, 806 F.2d 1556, 1557 (11th Cir. 1987) (affirming minimarket supported by evidence, and affirming award of rate consistent with minimarket but lower than counsel's billing rate); *Coulter v. Tennessee*, 805 F.2d 146, 149 (6th Cir. 1986) (market rate applies where court found billing rate exceeded prevailing rate), *cert. denied*, 482 U.S. 914 (1987).

The District has argued in the instant cases that counsel should receive the reduced rates they charge because a submarket exists

The cases applying what *SPIRG* describes as the community market method, are factually different from *Shakopee* and the micro-market cases in that they all involve instances where courts found attorneys reduced their rates for public interest reasons, and therefore have rates lower than those in the market the court finds relevant.[30] Thus, in the community rate cases, courts give less weight to the attorney's actual rate and instead apply the prevailing market rate rather than the rate the attorney charges to clients.

The more recent cases the District cites, in support of its "confusion in the circuits" contention, follow the approach described above. All these cases apply the attorney's actual rate, if consistent with prevailing market rates. If the billing and market rates are inconsistent, the court determines whether the actual billing rate or the prevailing community should be given greater weight, relying on factors such as whether the billing rate or the prevailing market rate is higher, and whether the billing rate reflects a reduction for public interest reasons.[31]

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and counsels' rates are consistent with that submarket. Unlike the so-called micromarket cases cited above, each of the courts in these cases, found there was insufficient evidence that a submarket exists.

[30] *See Davis*, 976 F.2d at 1548; *SOCM*, 857 F.2d at 1525 (D.C. Cir. 1988) (*en banc*); *SPIRG*, 842 F.2d at 1442-50; *Maldonado*, 811 F.2d at 1342; *Hall*, 817 F.2d at 928-29; *White*, 713 F.2d at 461.

[31] *See Beard v. Teska*, 31 F.3d 942, 955-57 (10th Cir. 1994) (where attorney's billing rate exceeded market rate, prevailing market rate should apply); *Casey v. City of Cabool*, 12 F.3d 799, 806 (8th Cir. 1993) (awarding prevailing market rate lower than billing rate); *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1148-50 (7th Cir. 1993) (remanding fee award based on prevailing market rates because district court failed to give weight to regular billing rates, which were higher than prevailing market rates; evidence indicated billing rates reflected market rate attorneys could command, and billing rates should have applied); *Barrow v. Falck*, 977 F.2d 1100, 1105-06 (7th Cir. 1992) (applying attorney's billing rate when it was lower than prevailing community rates on basis

*Blum* set forth guidelines suggesting that courts can consider both the customary billing rate and the prevailing market rate to determine what rate is reasonable. *Blum*, 465 U.S. at 495, n.11. *Blum's* broad guidelines give district courts flexibility to accord more weight to an attorney's customary rate in certain situations, and more weight to an attorney's market rate in other situations. The various circuits' affirmance of their district courts' exercise of discretion to address different situations differently does not constitute a conflict in their interpretations of *Blum*.

This Court previously recognized the inappropriateness of micro-managing such discretionary, fact-bound determinations by denying certiorari in *Webb v. Maldonado*, 484 U.S. 990 (1987), on the same issue presented here. In *Webb*, the 9th Circuit upheld an award of a prevailing market rate in excess of counsel's actual rate, but the Supreme Court denied certiorari, even though (prior to the D.C. Circuit's *in banc* decision in *SOCM*) the D.C. Circuit and the 9th Circuit had conflicting rules regarding this precise issue. Now, when the circuit conflict was resolved years ago by *SOCM*, and *Dague* has provided additional guidance about how to calculate rates, there is even greater reason for the Court to deny certiorari.

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that billing rate was rate *this* attorney could command in market, and specifically stating that court did not reach *SOCM* issue because attorney had not alleged that he reduced his rate for public interest reasons); *Chambless v. Masters, Mates & Pilots Pension Plan*, 885 F.2d 1053 (2d Cir. 1989) (in light of "meager" evidence to support plaintiffs' contentions regarding the market rate, the fact that evidence in record indicated that attorney's billing rates were consistent with lower end of market, and court's own knowledge of rates charged in community, court awarded rates lower than those plaintiffs requested), *cert. denied*, 496 U.S. 905 (1990); *Islamic Center*, 876 F.2d at 469 (remanding case where court awarded lower rate it held was prevailing in community, without providing rationale for departure from normal billing rate of counsel, which was higher, but within range of community rates established by evidence).

The District also claims there is a conflict within the D.C. Circuit about how to determine a reasonable rate. No such conflict exists,[32] but, even if it did, resolution by the D.C. Circuit would be more appropriate than granting certiorari. The D.C. Circuit's decision to deny rehearing *in banc*, indicates that the D.C. Circuit does not perceive an intracircuit conflict. App. 83-84.

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[32] Contrary to the District's argument, neither *SOCM* nor the instant cases conflict with *Goos v. National Ass'n of Realtors*, 997 F.2d 1565 (D.C. Cir. 1993), or *Kattan v. District of Columbia*, 995 F.2d 274 (D.C. Cir. 1993), *cert. denied*, 114 S.Ct. 1398 (1994). In *Goos*, plaintiff sought in the district court the hourly rates her attorney charged to "all his clients," and did not allege or offer evidence that her counsel "offered her a discounted rate for altruistic reasons," either customarily, or in that case. *Goos*, 997 F.2d at 1568-69. On appeal, plaintiff sought *Laffey* matrix rates for the first time. *Id.* at 1568. The D.C. Circuit affirmed the district court's rate determination that plaintiff could recover only the rate charged by her attorney ($130-$140) and not the rate "found in the schedule (or matrix) of prevailing community rates adopted in this circuit" ($220-$240). *Id.* at 1568. It relied on the fact that there was no evidence of a below market rate or a rate discounted for altruistic reasons. *Id.* at 1568-69.

Similarly, in *Kattan*, the D.C. Circuit, citing *Blum*, affirmed the determination by Judge Green, (who also decided *Galloway*), of an hourly rate equal to the highest rate in decisions cited to the court and within the range of market rates for similarly experienced counsel contained in plaintiff's own expert's declaration. Kattan did not seek rates higher than those her attorney charged clients, nor did she contend her counsel reduced her rate for altruistic reasons. 995 F.2d at 278-79. There was no discussion in *Kattan* of *SOCM*, the *Laffey* matrix, or a mini or micro market.

The cases the District cites do not support its claim that there is a conflict within the D.C. Circuit about how to determine a reasonable rate. What the cited decisions have in common with these cases is that, in all five instances, the D.C. Circuit affirmed factual findings by the district courts as to a reasonable hourly rate based on the rate evidence submitted, and the skill, experience, and reputation of each counsel.

## CONCLUSION

The District seeks to overturn the district courts' discretionary factual findings on reasonable hourly rates, an area that is well-suited to the exercise of broad judicial discretion. The Court of Appeals' decision is consistent with previous decisions of this Court and presents no conflict with other Circuits. This Court should deny the Petition for a Writ of Certiorari.

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